

# Rational Treaties: Article II, Congressional-Executive Agreements, and International Bargaining

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# RATIONAL TREATIES: ARTICLE II, CONGRESSIONAL-EXECUTIVE AGREEMENTS, AND INTERNATIONAL BARGAINING

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INTRODUCTION .....	1
I. THE STRUGGLE OVER INSTRUMENTS .....	4
II. TREATIES AS THE SETTLEMENT OF INTERNATIONAL CRISES .	11
A. Conflict as Bargaining Failure .....	14
B. Incomplete Information and Settlement .....	17
C. Conflict as a Commitment Problem.....	21
III. INTERNATIONAL AGREEMENTS AND THE U.S.	
CONSTITUTION .....	23
A. Choice of Instruments as Informational Signals .....	25
B. Choice of Instruments and Commitment .....	31
CONCLUSION .....	43

## INTRODUCTION

In April 2010, U.S. President Barack Obama and Russian President Dmitry Medvedev signed a new arms-control agreement.<sup>1</sup> “New START” will cut the strategic nuclear arms stockpiles of the two nations by 30%, limit the number of weapon launchers, and link the development of offensive and defensive missile systems.<sup>2</sup> President Obama was required to submit the agreement, the first arms-reduction pact between the two countries since the Moscow Treaty of 2002,<sup>3</sup> to the Senate for its approval before he could ratify it. As the treaty moved through the Senate in the summer of 2010, the Obama administration could count on fifty-nine votes from its own party but was unsure whether it could reach the two-thirds required by Article II, Section 2 of the Constitution for advice and consent.

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<sup>1</sup> Treaty on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, U.S.-Russ., Apr. 8, 2010, S. TREATY DOC. NO. 111-5.

<sup>2</sup> *Id.* at pmb., art. II.

<sup>3</sup> Treaty on Strategic Offensive Reductions, U.S.-Russ., May 24, 2002, S. TREATY DOC. NO. 107-8.

But according to many commentators and the apparent scholarly consensus, President Obama could have chosen an easier route to approval. Past Presidents have bypassed the advice-and-consent process of the Treaty Clause and sent some international agreements to both houses of Congress for approval as simple statutes, known as congressional-executive agreements. According to the *Restatement (Third) of Foreign Relations Law*, "[t]he prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance."<sup>4</sup> In his classic work, *Foreign Affairs and the United States Constitution*, Louis Henkin observed that "it is now widely accepted that the Congressional-Executive agreement is available for wide use, even general use, and is a complete alternative to a treaty."<sup>5</sup>

These opinions attempt to catch up to, rather than radically change, constitutional practice. Congressional-executive agreements have become a vital tool of American foreign policy and have surpassed treaties in terms of frequency. After World War II, the United States entered a period of rapid agreement making, entering into as many as 450 agreements per year as compared with the less than fifty per year before World War II.<sup>6</sup> According to the Congressional Research Service, nontreaties are responsible. Congressional-executive agreements, for example, accounted for 88.3% of all international agreements between 1946 and 1972.<sup>7</sup> From 1939 to 1989, the nation entered into 11,698 nontreaty international agreements and only 702 Article II treaties.<sup>8</sup> Oona Hathaway reports that from 1980 to 2000 the United States made 2744 congressional-executive agreements and only 375 treaties.<sup>9</sup> Congressional-executive agreements not only are numerous, but also bear on subjects of great importance to the American national interest. The North American Free Trade Agreement<sup>10</sup> (NAFTA) and the World Trade Organization (WTO) agreements,<sup>11</sup> the two most recent prominent examples, regulate roughly one-quar-

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<sup>4</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 cmt. e (1987).

<sup>5</sup> LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 217 (2d ed. 1996) (footnote omitted).

<sup>6</sup> CONG. RESEARCH SERV., S. PRT. 106-71, *TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE* 39 (Comm. Print 2001) [hereinafter *TREATIES*].

<sup>7</sup> R. ROGER MAJAK, CONG. RESEARCH SERV., *INTERNATIONAL AGREEMENTS: AN ANALYSIS OF EXECUTIVE REGULATIONS AND PRACTICES* 22 (Comm. Print 1977).

<sup>8</sup> *TREATIES*, *supra* note 6.

<sup>9</sup> Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Law-making in the United States*, 117 *YALE L.J.* 1236, 1258-60 (2008).

<sup>10</sup> North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 *I.L.M.* 289 (1993).

<sup>11</sup> *E.g.*, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 *U.N.T.S.* 154.

ter of the U.S. gross domestic product (GDP) related to imports or exports.<sup>12</sup>

Constitutional law, however, has struggled to find a place for non-treaty treaties. Ever since their accelerated use began, congressional-executive agreements have encountered serious challenges to their legitimacy. The constitutional text explicitly provides only one way for the federal government to reach international agreements: the President negotiates the agreement, two-thirds of the Senate gives its advice and consent, and the President ratifies.<sup>13</sup> Critics of modern practice make the simple and straightforward claim that Article II's Treaty Clause remains exclusive.<sup>14</sup> Defenders of congressional-executive agreements have engaged in linguistic acrobatics to avoid this result, claiming that "constitutional moments" have silently amended the Constitution, or looked to simple majoritarianism for support.<sup>15</sup> Others have attempted to find boundaries between treaties and congressional-executive agreements rooted in the constitutional structure that preserve a place for both.<sup>16</sup> The Supreme Court has never taken up the legality of congressional-executive agreements, though the lower courts have never rejected them.

This Article takes a different approach, one focused on function rather than legitimacy. It examines the instrumental value of the various forms of international agreement under the Constitution. It asks what advantages and disadvantages flow from the choice between congressional-executive agreements and treaties. It suggests that the approval and ratification processes of both types of agreements produce information that addresses bargaining difficulties produced by asymmetry. Treaties, for example, provide more credible information *ex ante* because of the greater political capital required for their approval.

A sharp difference between treaties and congressional-executive agreements lies in enforcement. The two types of international agreements provide different ways of addressing the absence of an international institution capable of compelling the parties to obey the agreement or awarding damages for violations. Treaties, for example, provide more *ex ante* signals of commitment because more political

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<sup>12</sup> See *National Income and Product Accounts Table: Table 1.8.6. Command-Basis Real Gross Domestic Product and Gross National Product, Chained Dollars*, BUREAU ECON. ANALYSIS, <http://bea.gov/national/nipaweb/TableView.asp?SelectedTable=46&FirstYear=2002&LastYear=2004&Freq=Qtr> (last updated Sept. 29, 2011) (reporting U.S. GDP of \$12.410 trillion, imports of \$1.979 trillion, and exports of \$1.252 trillion for the fourth quarter of 2004).

<sup>13</sup> U.S. CONST. art. II, § 2, cl. 2 (The President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur").

<sup>14</sup> See *infra* notes 24–27 and accompanying text.

<sup>15</sup> See *infra* notes 44–48 and accompanying text.

<sup>16</sup> See *infra* notes 49–52 and accompanying text.

capital is required to obtain two-thirds of the Senate to agree than majorities of each House. Congressional-executive agreements, on the other hand, provide stronger *ex post* guarantees because of the difficulty in terminating a statute. The latter may lead to more stable, longer-term cooperation than the former, contrary to the initial intuition based on the voting requirements.

Treaties and congressional-executive agreements, therefore, have different trade-offs that make one or the other better suited for different types of pacts. Treaties convey more credible information about the expected value of a good or territory, but less of a signal of *ex post* commitment. Congressional-executive agreements strike the opposite balance: less information, but greater commitment. An instrumental approach does not find the nonexclusivity of the Treaty Clause to be a constitutional defect. In fact, understanding the Constitution in this light sees value in having the different options for making international agreements. It allows the United States to send different amounts of information and signals of commitment to other nations depending on its own intentions and the specific context of the agreement. It would be a mistake, for instrumental reasons, to limit the federal government only to treaties or to congressional-executive agreements solely because of concerns over interpretive methodology or notions of democratic legitimacy.

Part I of this Article begins the analysis by describing the existing scholarly literature on the question of "interchangeability"—in other words the use of treaties or statutes to make international agreements. Part II introduces a rational choice model for the resolution of international disputes, which understands international agreements as a means to avoid wasteful conflict, but beset by informational asymmetry and commitment problems. Part III applies this model to the question of interchangeability, and shows the effect of the treaty-versus-statute choice on obstacles to settling disagreements between states. It ends by comparing arms-control and international trade agreements to illustrate the trade-offs between treaties and congressional-executive agreements.

## I

### THE STRUGGLE OVER INSTRUMENTS

International agreements present one of the great tensions between practice and the constitutional text and structure. Congressional-executive agreements have become an important tool of American foreign relations, but their legitimacy has remained consistently in doubt since their first consistent use in the New Deal period. Their main defect is the absence of any explicit authorization in the constitutional text for any form of international agreement other than

a treaty, made by the President with the advice and consent of two-thirds of the Senate.<sup>17</sup> It is difficult to maintain that the President and mere majorities of the House and Senate can use Article I of the Constitution for the exact same formal act described in Article II. This has led to ever weaker justifications for replacing Article II treaties with Article I statutes.

Debate over the interchangeability of instruments has focused on its legitimacy. Nontreaty international agreements appeared as early as 1792, when Congress authorized the Postmaster General to reach mail-exchange agreements with other countries.<sup>18</sup> Despite this early precedent, congressional-executive agreements remained rare for much of the nation's history. From 1789 to 1839, for example, the nation entered into sixty treaties and only twenty-seven other international agreements.<sup>19</sup> From 1839 to 1889, the numbers remained similarly low for both forms of agreements.<sup>20</sup> In fact, the number of treaties made has kept fairly stable throughout the nation's history, with a slight uptick in the period after World War II and rising close to fifty treaties only in a single year in the late 1990s.<sup>21</sup> Congressional-executive agreements, however, surged: from no more than two dozen per year in the late 1930s to more than 150 per year in the 1940s, peaks of 300 per year in the 1950s, and topping out at 400 per year by the 1970s and 1980s, followed by a decline to between 200 to 300 per year in the 1990s.<sup>22</sup> Presently, congressional-executive agreements number about an order of magnitude greater than treaties per year.<sup>23</sup>

Criticism and defense of this practice followed. One of the first critics was Edwin Borchard, who argued in 1944 that the Constitution set out only one method for making international agreements in Article II of the Constitution.<sup>24</sup> Article II, Section 2 of the Constitution states that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."<sup>25</sup> Borchard was right—at least with regard to the federal government. The Constitution does not describe any other way for the President or Congress to make agreements with other nations. Article I, Section 8, which lists Congress's powers, de-

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<sup>17</sup> See U.S. CONST. art. II, § 2, cl. 2.

<sup>18</sup> See Act of Feb. 20, 1792, ch. 7, § 26, 1 Stat. 232, 239.

<sup>19</sup> See TREATIES, *supra* note 6.

<sup>20</sup> See *id.* (reporting only 215 treaties and 238 other international agreements during the time period).

<sup>21</sup> See *id.*

<sup>22</sup> *Id.*

<sup>23</sup> See *id.*

<sup>24</sup> See Edwin Borchard, *Treaties and Executive Agreements—A Reply*, 54 YALE L.J. 616, 616 (1945). For an article that agrees with Borchard, see Raoul Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 33–48 (1972).

<sup>25</sup> U.S. CONST. art. II, § 2, cl. 2.

scribes the subject matters for regulation, but not their form.<sup>26</sup> Article VI describes the Supremacy Clause effects of treaties, while Article III includes them among the cases or controversies subject to federal-court jurisdiction, but neither mentions other international agreements.<sup>27</sup> Borchard made a straightforward *exclusio unius* argument: the inclusion of treaties alone implied the exclusion of all other forms of international agreement.

Borchard's argument for treaty exclusivity met with criticism from Myres McDougal and Asher Lans. Other scholars, such as Wallace McClure, Edward Corwin, and Quincy Wright had noted the rise of congressional-executive agreements and supported the easier path toward international cooperation that they presented.<sup>28</sup> But they had not launched a sustained defense of the legitimacy of congressional-executive agreements based on the constitutional text and structure. McDougal and Lans filled that omission. They properly observed that the Constitution showed knowledge of more than just treaties.<sup>29</sup> Article I, Section 10, for example, declares: "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power."<sup>30</sup> The Constitution distinguished between the treaty and these other forms of cooperation, and was clear when it wanted to prohibit the latter. Therefore, McDougal and Lans reasoned, the Constitution did not deprive the federal government of the power to make "agreements" or "compacts," which might also find support in the Necessary and Proper Clause as an implementation of a free-standing congressional power. These agreements, they argued, could take the form of statutes or even unilateral presidential orders.<sup>31</sup>

Later supporters of congressional-executive agreements went beyond McDougal and Lans's textual arguments to register instrumental advantages for the Article I path. Giving the Senate an outsized role in the making of international agreements no longer made sense, as the sectional concerns present at the time of the Framing had disap-

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<sup>26</sup> See *id.* at art. I, § 8.

<sup>27</sup> See *id.* at art. VI, cl. 2 ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."); *id.* at art. III, § 2, cl. 1 (providing that jurisdiction of federal courts may include treaties).

<sup>28</sup> See EDWARD S. CORWIN, *THE CONSTITUTION AND WORLD ORGANIZATION* (1944); WALLACE MCCLURE, *INTERNATIONAL EXECUTIVE AGREEMENTS: DEMOCRATIC PROCEDURE UNDER THE CONSTITUTION OF THE UNITED STATES* (1941); Quincy Wright, *The United States and International Agreements*, 38 AM. J. INT'L L. 341 (1944).

<sup>29</sup> See Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy* (pts. 1 & 2), 54 YALE L.J. 181, 534, 535 (1945).

<sup>30</sup> U.S. CONST. art. I, § 10, cl. 3.

<sup>31</sup> McDougal & Lans, *supra* note 29, at 203-06.

peared.<sup>32</sup> The growth in the Senate's size reduced its ability to act with secrecy and speed, as the Framers had hoped, and the Senate never became the equal partner in foreign affairs that some had predicted.<sup>33</sup> Allowing one-third of the states to block international agreements allowed a minority to pursue an isolationist foreign policy, with sometimes disastrous results (as with the failure to join the League of Nations).<sup>34</sup> Congressional-executive agreements would advance a more democratic form of foreign policymaking that would better serve the national interest. "One way of rendering treaty making more democratic without constitutional amendment," Louis Henkin wrote, "might be to have agreements made by the President if authorized or approved by both houses of Congress."<sup>35</sup> This would serve "the cause of greater democracy."<sup>36</sup>

These matters stood until consideration of the NAFTA and WTO agreements. Laurence Tribe revived the Borchard position to attack the constitutionality of the Article I path for international agreements, based on a more nuanced reading of the constitutional text and structure.<sup>37</sup> Tribe argued that the constitutional text and structure do not permit the invention of an alternative form of treaty making. Drawing from Supreme Court decisions such as *INS v. Chadha* (striking down the legislative veto)<sup>38</sup> and *New York v. United States* (prohibiting the commandeering of state legislatures),<sup>39</sup> Tribe argued that the Neces-

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<sup>32</sup> See generally JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 69–79 (1996) (detailing sectional concerns present at the Framing).

<sup>33</sup> John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CALIF. L. REV. 851, 889, 894–95 (2001) (book review) ("Yet another result of this structure is Congress's freedom to frustrate presidential foreign policy and treaty initiatives through legislation and appropriations. If the Executive were to use its powers over treaty interpretation to change foreign policy, that would not be the end of the matter. Like the British Parliament, the Senate and House could use their legislation and funding powers to oppose a new treaty reinterpretation. Political struggle by the political branches, using their plenary constitutional powers, is not itself unconstitutional; on the contrary, it is the way the Framers designed the system to work."); James Wilson, Speech at a Public Meeting in Philadelphia (Oct. 6, 1787), reprinted in 13 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 337, 341 (John P. Kaminski & Gaspare J. Saladino eds., 1981) (remarking that with respect to treaties, "in its executive character, [the Senate] can accomplish no object, without the concurrence of the [P]resident"); see also RAKOVE, *supra* note 32, at 255 ("Those who blamed the erratic quality of the American war effort on Congress, or recalled its difficulties in framing terms of peace, similarly wondered whether matters of war and peace were best decided by collective debates.").

<sup>34</sup> John C. Yoo, *Law as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 776 (2001).

<sup>35</sup> LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* 60 (1990).

<sup>36</sup> *Id.*

<sup>37</sup> See Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1249–78 (1995).

<sup>38</sup> 462 U.S. 919, 959 (1983).

<sup>39</sup> 505 U.S. 144, 188 (1992).



sary and Proper Clause could not make up for a lacuna in the text.<sup>40</sup> He further compared the Treaty Clause to the adjacent Appointments Clause to show that Article II clearly provides for alternate forms of government action when the Framers wanted them.<sup>41</sup> Lastly, Tribe claimed that the Article I method conceivably allowed Congress to enter the nation into an international agreement over a presidential veto, a result forbidden by Article II's vesting of the final power to make a treaty with the executive.<sup>42</sup> Tribe concluded that adoption of the NAFTA and WTO agreements as statutes violated the Constitution.<sup>43</sup>

Bruce Ackerman and David Golove came to Article I's defense. They portrayed the use of congressional-executive agreements as a nontextual amendment to the Constitution.<sup>44</sup> For them, the very fact that the constitutional text lacks an alternative form for treaty making shows that practice has changed the Constitution's meaning.<sup>45</sup> They argued that as the end of World War II neared, a popular movement to increase the United States' participation in international institutions led to an attack on the Senate's antidemocratic check on treaty making.<sup>46</sup> The transformative 1944 presidential election validated Roosevelt's plans to replace the supermajority requirement for treaties with a majoritarian process and became part of the New Deal's broader transfer of power from the states to the federal government.<sup>47</sup> Adoption of the United Nations Charter as a treaty, and the International Monetary Fund and World Bank agreements through Article I, led to a new constitutional settlement enshrining interchangeability as part of a living Constitution.<sup>48</sup>

Other scholars have attempted to find a middle ground that preserves both treaties and congressional-executive agreements. I argued elsewhere that the Constitution reserves Article II treaties for significant military and political agreements because they involve the coordination of the President's executive powers in foreign affairs with legislative action.<sup>49</sup> Under this view, congressional-executive agreements remain appropriate for pacts involving international commercial and financial affairs, where Article I, Section 8 gives Congress

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<sup>40</sup> See Tribe, *supra* note 37, at 1258–61.

<sup>41</sup> See *id.* at 1272–75.

<sup>42</sup> See *id.* at 1252–57.

<sup>43</sup> See *id.* at 1267 n.156.

<sup>44</sup> See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 883–96 (1995).

<sup>45</sup> See *id.* at 805.

<sup>46</sup> See *id.* at 861–65.

<sup>47</sup> See *id.* at 883–89.

<sup>48</sup> See *id.* at 890–96.

<sup>49</sup> See Yoo, *supra* note 34, at 798–813.

control.<sup>50</sup> On the other hand, matters resting outside Article I, Section 8 would still require international regulation by treaty.<sup>51</sup> Peter Spiro sought a dividing line between treaties and congressional-executive agreements in practice, which he argued could dictate constitutional meaning in the same way that judicial opinions might.<sup>52</sup>

More recently, Oona Hathaway and Rosalind Dixon, separately, have extended the transformative approach. Hathaway argues that no subject-matter distinctions remain between treaties and congressional-executive agreements.<sup>53</sup> Hathaway's empirical data show that congressional-executive agreements have been used for every subject on which international agreements have been made.<sup>54</sup> Eliminating treaties and relying only on congressional-executive agreements would provide for a more democratic form of lawmaking, reject the obsolete concerns that originally gave the Senate such an outsized role in treaty making, and produce more reliable American commitments.<sup>55</sup> Although Dixon disagrees with Ackerman's theory of constitutional change, she argues that the Treaty Clause creates high constitutional error costs because changes in population have made it even harder to ratify a treaty than the Framers intended.<sup>56</sup> In interchangeability, Dixon writes, "Congress has in fact succeeded in using ordinary legislative means to update constitutional meaning (i.e., the supermajority voting rule found in Article II)."<sup>57</sup> For Ackerman and Golove, Hathaway, and Dixon, President Woodrow Wilson could have resubmitted the Treaty of Versailles, after its rejection by the Senate in 1919 by one vote, for approval by a simple majority of both houses of Congress.

These scholarly accounts suffer from various flaws. The exclusivity position of Borchard and Tribe, for example, cannot account for the long historical pedigree of congressional-executive agreements or the huge burst in their use in the last seventy years. It gives no recognition to Congress's Article I, Section 8 powers, leading to an overly broad reading of the scope of the Treaty Clause. McDougal and Lans's claim infers too much from the negative restrictions on the states. When Article I, Section 10 denied a power to the states, but the Framers wanted to give the federal government that same power, they did not leave it to a negative inference—they vested Congress with the

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<sup>50</sup> *Id.* at 764.

<sup>51</sup> *Id.*

<sup>52</sup> See Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961, 1009–34 (2001).

<sup>53</sup> See Hathaway, *supra* note 9, at 1239.

<sup>54</sup> See *id.*

<sup>55</sup> *Id.* at 1307–38.

<sup>56</sup> See Rosalind Dixon, *Updating Constitutional Rules*, 2009 SUP. CT. REV. 319, 328–30.

<sup>57</sup> *Id.* at 331.

authority explicitly. Thus, Article I, Section 10 prohibits states from granting letters of marque and reprisal, while Article I, Section 8 grants that power to the states.<sup>58</sup>

McDougal and Lans's successors suffer from even more serious problems. Ackerman and Golove's account has the same faults that afflict Ackerman's general theory of constitutional change outside of the Article V amending process. Even worse, Ackerman and Golove's claim that 1944 represented a "constitutional moment" for interchangeability is unpersuasive even within Ackerman's theory of nontextual constitutional change. The political history of the period reflects little popular concern in the 1944 elections over the constitutional methods of making international agreements.<sup>59</sup> Henkin's and Hathaway's separate claims for greater democracy in treaty making encounter the same problems as the original defenses of McClure, Corwin, and Wright. If the Constitution should be purged of all "nondemocratic" impurities, then the Senate, the Electoral College, judicial review, and even aspects of the House of Representatives are equally as repugnant as treaties. Favoring simple majoritarianism ignores the higher lawmaking procedures used to make the Constitution, which established certain supermajority and nondemocratic procedures to ensure more deliberative decision making that better reflected the popular will.

One common feature shared by most of these efforts is their criticism of multiple methods for making international agreements. Borchard and Tribe believe that Article II, Section 2 sets forth the exclusive method to make treaties.<sup>60</sup> If the Constitution does not explicitly allow for congressional-executive agreements, there are no alternatives. Henkin, Ackerman and Golove, and, more recently, Hathaway argue that congressional-executive agreements should supplant treaties because of their better democratic pedigree.<sup>61</sup> Whether because of unusual theories of constitutional change or desires to reduce countermajoritarian features of the government, they see no reason for the continued use of the Article II sequence. To them, the treaty-making process is a relic of the nation's unhappy past, where Southern concerns over slavery led to the Senate's exaggerated role. The debate has this absolutist feature because it soon became entangled in broader arguments over the legitimate method for interpreting the Constitution and how it allows for change.

Despite these academic theories, practice shows little sign of falling on either the treaty-exclusivity side or the majoritarian side. The

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<sup>58</sup> See U.S. CONST. art. I, § 10, cl. 1; *id.* at art. I, § 8.

<sup>59</sup> See Yoo, *supra* note 34, at 779-88.

<sup>60</sup> See *supra* Part I.

<sup>61</sup> See *supra* Part I.

national government continues to use congressional-executive agreements, perhaps even as freely as Hathaway and Dixon claim. Nevertheless, the United States still reserves the Article II process for some of the most significant national security issues. In the last decade, for example, the Bush administration submitted the Treaty of Moscow, which drastically cut American and Russian nuclear warhead arsenals, to the Senate as a treaty.<sup>62</sup> The Obama administration has done the same with New START.<sup>63</sup>

Instead of renewing the debate for or against the legitimacy of these decisions, this Article asks instead about the consequences. It seeks to understand the trade-offs of choosing one instrument over the other by reversing the direction of the analysis. The earlier work first attacks the question of interchangeability within the context of familiar theories of constitutional interpretation and then asks about the implications for making agreements on the international stage. This Article begins with the international system to study its effects on domestic constitutional structure. Treaties and congressional-executive agreements are poised to address different aspects of the difficulties that nations encounter when making credible commitments. The interaction of the international system and the domestic system can find the solution for the interchangeability debate that has eluded constitutional scholars.

## II

### TREATIES AS THE SETTLEMENT OF INTERNATIONAL CRISES

Because the conventional constitutional accounts remain unsatisfying, a more revealing approach may lie in a consequentialist account of the making of international agreements. We can understand international agreements as a means for solving crises between nations. A classic example is a peace treaty that ends a war, such as the Treaty of Paris of 1783, which ended the Revolutionary War between the United States and Great Britain.<sup>64</sup> Treaties also can include agreements that head off possible conflict, such as the agreement between the United States and Great Britain to demarcate the border between the Oregon territory and Canada.<sup>65</sup> They might also resolve struggles between nations over land, with one side accepting payment in exchange for forswearing its claim to a territory. Examples are the Louisiana Purchase, which transferred France's North American possessions to

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<sup>62</sup> The Senate consented to the Treaty on March 6, 2003. *See* 108 CONG. REC. S3243 (daily ed. Mar. 6, 2003).

<sup>63</sup> The Senate consented to the Treaty on December 22, 2010. *See* 111 CONG. REC. S10,982 (daily ed. Dec. 22, 2010).

<sup>64</sup> *See* Definitive Treaty of Peace, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80.

<sup>65</sup> *See* Convention with Great Britain, U.S.-Gr. Brit., Oct. 20, 1818, 8 Stat. 248.

the United States for \$20 million,<sup>66</sup> the Adams-Onís treaty, which recognized American possession of Florida in exchange for a few million dollars,<sup>67</sup> and Seward's Folly, as it was known, in which Russia sold Alaska to the United States for another few million dollars.<sup>68</sup> Agreements might also involve reciprocal treatment for the free flow of commerce and travel, such as NAFTA, which will create surpluses and losses that will be shared between the nations.<sup>69</sup> Or they may limit wasteful competition that allows nations to save resources or limit the destructiveness of war, such as arms-control agreements.<sup>70</sup>

This Article begins with a standard bargaining model drawn from political science to understand these agreements. The model simplifies international politics by assuming that two nations in a crisis can choose between war and peace. In general, it assumes that war arises because the nations have failed to reach a settlement, which would otherwise be in their interests, because it would avoid the deadweight losses of war. Thus, it treats international conflicts much in the way that Robert Cooter and Daniel Rubinfeld model litigation as a choice between settlement and trial in which the parties have an interest in avoiding the deadweight losses of litigation costs.<sup>71</sup> It also works in the same direction as scholars, such as Eric Posner and Jack Goldsmith and Andrew Guzman, who have applied rational choice theory to international law.<sup>72</sup> It is different from these approaches, however, in linking international law with domestic law and in moving away from the broader debate over compliance with customary international law toward a more spartan model of international relations. In this respect, this Article follows in the path charted by Robert Putnam in seeking general equilibrium theories that account for the interaction of international and domestic politics.<sup>73</sup>

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<sup>66</sup> See Treaty Between the United States of America and the French Republic, U.S.-Fr., Apr. 30, 1803, 8 Stat. 200.

<sup>67</sup> See Treaty of Amity, Settlement, and Limits, U.S.-Spain, Feb. 22, 1819, 8 Stat. 252.

<sup>68</sup> See Treaty Concerning the Cessation of the Russian Possessions in North America, U.S.-Russ., March 30, 1867, 15 Stat. 539.

<sup>69</sup> See North American Free Trade Agreement, *supra* note 10, at 289.

<sup>70</sup> See Treaty on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, U.S.-Russ., May 13, 2010, S. TREATY DOC. NO. 111-5.

<sup>71</sup> See, e.g., Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982); Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067 (1989); Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435 (1994).

<sup>72</sup> See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2008); ERIC A. POSNER, *THE PERILS OF GLOBAL LEGALISM* (2009). But see Jens David Ohlin, *Nash Equilibrium and International Law*, 96 CORNELL L. REV. 869, 888-89 (2011) (challenging rational choice theory on the grounds that it fails to consider the value of planning).

<sup>73</sup> See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 430 (1988).

There is an important difference between the applications of the bargaining model to litigation and to international relations. Failure to settle domestic legal claims usually results from informational asymmetries and imbalances in financial resources to conduct litigation.<sup>74</sup> Enforcement of a settlement is usually not a difficult question because the parties fall within the personal jurisdiction of the court, which has institutional resources to carry out orders. If a defendant, for example, refuses to pay the damages called for by an agreement approved by the court, a judge may levy fines or even hold the defendant in contempt of court, which can result in jail time.

In international relations, by contrast, asymmetries in information and resources form only part of the obstacles to a settlement. Even if the parties have complete information, they still might not reach an agreement because of an international environment characterized by weak institutions. There are no effective supranational organizations that can coerce parties to obey treaties—at least nothing like a domestic court. Without enforcement, nations still may not enter into agreements that would avoid a wasteful conflict, especially if the agreement involves issues that may shift the balance of power in the future.

Much of the international relations literature focuses on why nations go to war. This Part builds on that analysis, but turns it toward ways that a domestic constitutional system can help find a stable peace. In particular, it builds on efforts to explain the “democratic peace”—the empirical correlation that democracies in the period since 1814 do not fight wars against each other—within the framework of international conflict as bargaining failure.<sup>75</sup> Political scientists have sought to explain why democracies do not war with each other by looking to features of their domestic political structures.<sup>76</sup> Democracies might not go to war with each other because their relatively transparent political systems may facilitate negotiations.<sup>77</sup> An overlooked area in this vein may be domestic constitutional arrangements. Because weak to nonexistent enforcement by effective international institutions remains a stumbling block, nations that can commit more deeply to keeping international agreements may have an advantage in world affairs.

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<sup>74</sup> See, e.g., Lucian Arye Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. ECON. 404 (1984) (discussing how informational asymmetry influences settlement decisions).

<sup>75</sup> See sources cited *infra* notes 88–90 and accompanying text.

<sup>76</sup> See sources cited *infra* notes 88–90 and accompanying text.

<sup>77</sup> See sources cited *infra* notes 88–90 and accompanying text.

### A. Conflict as Bargaining Failure

As Thomas Schelling observed, “conflict situations are essentially bargaining situations.”<sup>78</sup> Nations have disputes because of competing interests. A nation may wish to gain a good, like territory or population or trading rights. Or it may wish to stop harm, such as pollution, population migration, or international crime and terrorism. Another nation may want to acquire the same territory for itself, or it may want the harm to continue because it is a negative externality of conduct that benefits it.

Nations acting rationally should generally reach a settlement of their conflicting goals. It is in their interests to divide the benefits of a good through negotiation rather than to escalate their dispute into a conflict. A conflict will cause deadweight losses—such as the lives and treasure lost in war—or will require the nations to spend resources on arms and security that it might otherwise allocate to more productive uses. War, in other words, reduces the size of the pie that two nations in a dispute can divide; they should reach a Pareto-superior settlement that will leave each nation better off than if they go to war. War is, as Robert Powell puts it, an “inefficiency puzzle.”<sup>79</sup> This insight has given rise to a bargaining theory approach to conflict, which has become a leading approach to the study of crisis, escalation, and war in political science.<sup>80</sup>

Since Schelling’s insight, this flourishing literature has formalized the causes of war. The model works as the following example illustrates. Imagine that the United States and China have a dispute for control over a territory. The United States currently controls the territory, and China wishes to gain a share of it. China makes a demand accompanied by a threat. The United States can decide to resist or accede to China’s demand. If the United States decides to transfer the share of the territory to China, the game ends. If the United States resists, then China must decide whether to go to war.

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<sup>78</sup> THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 5 (1960) (emphasis omitted).

<sup>79</sup> Robert Powell, *War as a Commitment Problem*, 60 INT’L ORG. 169, 169 (2006) [hereinafter Powell, *War as a Commitment Problem*]; see also Robert Powell, *The Inefficient Use of Power: Costly Conflict with Complete Information*, 98 AM. POL. SCI. REV. 231, 235–37 (2004) [hereinafter Powell, *The Inefficient Use of Power*] (describing war and related activities as inefficient uses of power).

<sup>80</sup> See, e.g., Dan Reiter, *Exploring the Bargaining Model of War*, 1 PERSP. ON POL. 27 (2003) (discussing bargaining theory and comparing it with other theories of war); see also ROBERT POWELL, IN THE SHADOW OF POWER: STATES AND STRATEGIES IN INTERNATIONAL POLITICS (1999); James D. Fearon, *Rationalist Explanations for War*, 49 INT’L ORG. 379, 380 (1995) (“[W]ar is costly and risky, so rational states should have incentives to locate negotiated settlements that all would prefer to the gamble of war.”). But see David A. Lake, *Two Cheers for Bargaining Theory: Assessing Rationalist Explanations of the Iraq War*, 35 INT’L SECURITY 7, 43–52 (2010) (critiquing bargaining theory through a behavioral explanation of the Iraq War).

Iterations of counteroffers and counterresponses can occur between China's first demand and the United States' final response, but at the end the United States must choose between resistance or transfer, and China must decide whether to go to war if the United States resists.

War may produce a victory that brings part of the disputed territory, or even all of it. But the outcome of war is uncertain. Making the right decision whether to resist or accede will depend on the probability of the outcome of conflict between the armed forces of the United States and China. If the expected value of going to war exceeds the expected costs, China should go to war in response to a U.S. rejection of its offer. If the expected costs exceed the expected value, China should not go to war. On the flip side, if the United States' expected cost of war exceeds its expected gain, the United States should agree to China's demand. If the opposite holds true, the United States should resist China's demand and its threats.

The expected gains and costs are a function of probability of victory, the value of the territory, and the anticipated destruction of war. As a formula, the expected value of war to China will be

$$W(\text{China}) = P(\text{China}) \times V(\text{China}) - C(\text{China}),$$

where  $W(\text{China})$  means the expected value of war to China;  $P(\text{China})$  means the probability that China would prevail in war;  $V(\text{China})$  means the value of the territory to China, and  $C(\text{China})$  means the cost of war.  $P(\text{China}) \times V(\text{China})$  is the expected value of gaining the territory.

Similarly, the expected value of war to the United States will be

$$W(\text{U.S.}) = P(\text{U.S.}) \times V(\text{U.S.}) - C(\text{U.S.}),$$

where  $W(\text{U.S.})$  means the expected value of war to the United States;  $P(\text{U.S.})$  means the probability that the United States would prevail in war;  $V(\text{U.S.})$  means the value of the territory to the United States; and  $C(\text{U.S.})$  means the cost of war to the United States.

A further point is worth making on  $P$ . The probability that China would prevail in war is the primary uncertainty. It is a function of more than just economic resources, such as the size and configuration of the Chinese armed forces, which depends on spending, as well as factors such as organization, leadership, experience, and technology. It is also relative, as it depends on how Chinese forces are likely to fare against the armed forces of the United States, rather than another country. Because of this relationship,  $P(\text{China}) + P(\text{U.S.}) = 1$ . In other words, unless China were certain it would prevail in war,  $P(\text{China})$  must be less than one. The probability that the United States would prevail must be the remainder.

A similar relationship does not necessarily obtain for the other variables in the equation. The value of the territory to China may not



be the same as the value to the United States. For example, the territory might have a fixed estimated value in resources, but one side may have better technology or organizations to exploit them. But a given territory might also have more cultural or defense importance for one side than another—possessing Taiwan, for example, will have greater value to China because of China's desire to unify historical Chinese territory under its control. The cost of war may also differ between the contending nations. One nation may suffer smaller losses at certain probabilities of winning because of different investments in and effectiveness of its armed forces, difference in the value of lives between the nations, and strategic and tactical disparities. For example, the United States, by investing more productively in its armed forces, may suffer fewer casualties by going to war than China, but the higher per-capita GDP might also mean that each U.S. life lost in a conflict is more valuable.

War should not erupt under conditions of perfect information. Suppose that China wishes to obtain territory within the control of the United States. If  $W(\text{China})$  is negative, the expected value of a Chinese victory is less than the expected cost of war. The United States should reject China's offer, and China will back down; no war will result. If  $W(\text{China})$  is positive, the expected value of Chinese victory is greater than the expected cost of war. The United States knows that China will go to war if the demand is rejected. The United States should reach a negotiated settlement, unless China's valuation of the territory is so great relative to the United States' that any settlement would require the United States to give China so much in concessions that the United States would be better off going to war. A similar situation arises when the United States' valuation is so great relative to China's. However, when the valuations of the two countries are almost equivalent, negotiating an agreement will place both countries strictly better off as opposed to going to war.

Under certain conditions, the range of potential outcomes of negotiations is predictable. Assume that the value of the territory is roughly the same for both China and the United States, perhaps because the territory's value lies in its physical resources. In other words,  $V(\text{China}) = V(\text{U.S.})$ , denoted simply by  $V$  in this example. Assume also that China's probability of winning is 67% and the United States' probability is 33%. Since the value of any settlement to China,  $S(\text{China})$ , must make China better off than it would have expected to be from going to war:  $S(\text{China}) > W(\text{China}) = 67\% \times V - C(\text{China})$ . Similarly, the value of any settlement to the United States,  $S(\text{U.S.})$ , must make it better off than it would have been had it gone to war:  $S(\text{U.S.}) > W(\text{U.S.}) = 33\% \times V - C(\text{U.S.})$ . By making use of the fact that

in a zero-sum game, such as this one,  $S(\text{China}) + S(\text{U.S.}) = V$ , it can easily be shown that

$$67\% \times V - C(\text{China}) < S(\text{China}) < 67\% \times V + C(\text{U.S.})$$

and

$$33\% \times V - C(\text{U.S.}) < S(\text{U.S.}) < 33\% \times V + C(\text{China}).$$

While the value of the settlement to each country must exceed its expected value from going to war, it also must not exceed its expected value of the territory plus the other country's deadweight loss from war. If the latter condition does not hold, a country has captured more than the entire deadweight loss the other country was trying to avoid by negotiating a settlement. Thus, the other country is worse off by the settlement than it would have been had it gone to war. Both countries should accept a negotiated settlement along these lines because they will avoid incurring the deadweight costs of the conflict itself.

## B. Incomplete Information and Settlement

Incomplete information can prevent the United States and China from reaching a settlement, even if both nations act rationally, as sketched out in Part II.A. With imperfect information, the United States cannot accurately estimate China's expected value from war,  $W(\text{China})$ , and the same for China and  $W(\text{U.S.})$ . Even if both the United States and China have a fair sense of the value of the territory to the other, they will have a difficult time estimating the probability of victory. Some factors that influence  $P(\text{China})$  and  $P(\text{U.S.})$  could prove observable by monitoring public budgets, following military exercises, providing national technical means of surveillance such as satellites, and practicing espionage. Through these means, China and the United States could estimate the size of an opponent's armed forces, the spending devoted to defense, the nature of weapon systems, and military performance on certain terrains. But other factors will lie within the private information of each country, such as military capabilities, strategies and tactics, unit morale and effectiveness, and the willingness of the national population and leadership to devote resources and take losses in a drawn-out conflict.

Not only will this information be private, but nations may have an incentive to manipulate public knowledge. They may wish to hide their strengths in order to achieve tactical surprise. China, for example, concealed its movement of large forces into North Korea as General MacArthur's forces approached the Yalu River in 1950 in order to win a significant victory.<sup>81</sup> Or nations might want to exaggerate their

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<sup>81</sup> JAMES L. STOKESBURY, *A SHORT HISTORY OF THE KOREAN WAR* 97–102 (1988).

strength in order to bluff in negotiations. Germany hid its military weakness as it succeeded in annexing Czechoslovakia in 1938 and invading Poland without any military response by Great Britain or France.<sup>82</sup> Different estimates about the probability of success in war, therefore, can arise even without introducing irrationality, such as an emotional overestimate of the valor of a nation's troops, or bounded rationality stemming from the overwhelming complexity of predicting the outcome of armed conflict.

War can result because of asymmetric information on the probability of winning a conflict. If China underestimates  $P(\text{U.S.})$ , for example, it will assume that  $W(\text{U.S.})$  is lower than it actually is. This will lead it to demand more of the disputed territory than it should, and it will expect the United States to concede at a lower level of threat than it will. Ultimately, China's misreading of  $P(\text{U.S.})$  will increase the lower end of the range of offers that China will accept. This will increase the chances of war, because the United States will be willing to go to war when its expected value from war exceeds the costs and it cannot reach an agreement with China that will allow it to avoid the costs of war. Another effect of asymmetric information mentioned above is that nations may bluff. If  $W(\text{China})$  is uncertain, for example, due to private information of  $P(\text{China})$ , the United States does not know whether China's demand genuinely reflects the distribution of existing power, and cannot decide on firm information whether to concede or go to war. China could be exaggerating its probability of victory to get better terms, and the United States could be doing the same in response.

Political science scholars have explored whether domestic factors can help overcome the bargaining problems created by asymmetric information. Rational choice studies have suggested that the factual correlation that democracies do not fight wars with each other may stem from the advantages that democracies enjoy over nondemocracies in revealing private information credibly.<sup>83</sup> Several statistical studies have shown that democracies since 1814 do not wage war against each other, but that they fight autocracies regularly and win a high percentage of those conflicts, and that they suffer lower casualties and fight for shorter periods than autocracies.<sup>84</sup> One set of scholars explains this phenomenon by claiming that democracies place

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<sup>82</sup> See generally ERNEST R. MAY, *STRANGE VICTORY* (2000) (explaining that Britain and France greatly overestimated Germany's military strength).

<sup>83</sup> See *infra* notes 87–88.

<sup>84</sup> See DAN REITER & ALLAN C. STAM, *DEMOCRACIES AT WAR 4* (2002) (finding that democracies emerge victorious because they start winnable wars and because their soldiers fight with higher military effectiveness); David A. Lake, *Powerful Pacifists: Democratic States and War*, 86 AM. POL. SCI. REV. 24, 24 (1992). But see D. Scott Bennett & Allan C. Stam III, *The Declining Advantages of Democracy: A Combined Model of War Outcomes and Duration*, 42 J.

institutional constraints on war because of viable opposition parties that will take power in the event of defeat and the unwillingness of the population to take high casualties.<sup>85</sup> We will not take up those theories here.

More usefully here, a second set of scholars argues that the democratic peace may arise because democracies can better solve asymmetric information problems in international bargaining.<sup>86</sup> States can reach settlements if they can reveal private information about their probabilities of winning, but they must do so credibly. The possibility of bluffing and the absence of strong governmental institutions make this difficult. Economists have shown that, even in such circumstances, negotiators can act credibly through the use of costly signals.<sup>87</sup> By revealing information in a way that generates significant costs, nations can separate themselves from those who would bluff. If the  $P(\text{U.S.})$  is high, it could take steps during its crisis with China that have greater costs—such as large-scale military deployments—than those taken by a nation whose probability of winning was lower.

Democracies may have greater facility in sending costly signals because of audience costs. “Audience costs” refers to the domestic costs incurred by a governing regime when it suffers a setback in foreign affairs.<sup>88</sup> The simple idea is that a state has two groups, the governing regime and its supporters, and the opposition. If the ruling party makes a threat to use force and backs down, it will suffer domestic political costs, both among its own supporters and the opposition

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CONFLICT RESOL. 344, 365 (1998) (contending that autocracies have the advantage over democracies in long wars).

<sup>85</sup> See Bruce Bueno de Mesquita & Randolph M. Siverson, *War and the Survival of Political Leaders: A Comparative Study of Regime Types and Political Accountability*, 89 AM. POL. SCI. REV. 841, 841 (1995); Michael W. Doyle, *Liberalism and World Politics*, 80 AM. POL. SCI. REV. 1151, 1160–61 (1986); James D. Fearon, *Domestic Political Audiences and the Escalation of International Disputes*, 88 AM. POL. SCI. REV. 577, 577 (1994); James Fearon, *Signaling Foreign Policy Interests: Tying Hands Versus Sinking Costs*, 41 J. CONFLICT RESOL. 68, 69–70 (1997); Christopher F. Gelpi & Michael Griesdorf, *Winners or Losers? Democracies in International Crisis, 1918–1994*, 95 AM. POL. SCI. REV. 633, 634 (2001); Zeev Maoz & Bruce Russett, *Normative and Structural Causes of Democratic Peace, 1946–1986*, 87 AM. POL. SCI. REV. 624, 625–26 (1993); Dan Reiter & Allan C. Stam III, *Democracy, War Initiation, and Victory*, 92 AM. POL. SCI. REV. 377, 378 (1998); Kenneth A. Schultz, *Do Democratic Institutions Constrain or Inform? Contrasting Two Institutional Perspectives on Democracy and War*, 53 INT’L ORG. 233, 236 (1999).

<sup>86</sup> See sources cited *infra* note 88.

<sup>87</sup> See ERIC A. POSNER, *LAW AND SOCIAL NORMS* 19–21 (2000).

<sup>88</sup> See, e.g., James D. Fearon, *Domestic Political Audiences and the Escalation of International Disputes*, *supra* note 85, at 585–86 (stating that democracies are less likely to back down in an international crisis because they generate greater audience costs than do nondemocracies); Kenneth A. Schultz, *Do Democratic Institutions Constrain or Inform? Contrasting Two Institutional Perspectives on Democracy and War*, 53 INT’L ORG. 233, 236–37 (1999); Kenneth A. Schultz, *Domestic Opposition and Signaling in International Crises*, 92 AM. POL. SCI. REV. 829, 830 (1998); Branislav L. Slantchev, *Politicians, the Media, and Domestic Audience Costs*, 50 INT’L STUD. Q. 445, 447 (2006).

party. This dynamic is not unique to democracies, but in systems with competitive, representative elections, the audience costs will be significantly higher. Audience costs can appear in a democracy in several ways. First, public threats to use force in the event of a crisis will create high audience costs if a leader backs down. Second, opposition parties will demand more information about a crisis and the nation's strategies, which will generally be aired publicly. Third, a democracy might separate the foreign affairs power into executive and legislative branches, in which case the former may need to cooperate with the latter to undertake any military steps to follow through on a threat. And obviously, a setback in conflict or settlement will undermine the regime in the next elections.

Understood in these ways, however, audience costs may also offer a means for democracies to better signal their private information. If the American President makes public declarations of military measures to be taken in the event that China escalates during a crisis—like President John F. Kennedy's threats in the event that Soviet missiles were not removed during the Cuban Missile Crisis<sup>89</sup>—the President will suffer high domestic political costs for not following through. To justify the case for war, the President will disclose to the electorate information about the nature of the threat, the likelihood of winning, and why the war advances the national interest. If the President seeks funds or authorization from Congress, the President will disclose even more information about the likelihood and outcome of a conflict, and any legislative approval will provide even more signals about national resolve and willingness to bear casualties and costs in a conflict. Democracies, however, will balance the gains from credible signaling against the costs in delaying action and giving up tactical surprise, which may prove more valuable against autocracies or terrorist groups.

The nature of the signals may affect whether the crisis leads to conflict or settlement. Costly signals in the context of international bargaining may take two forms.<sup>90</sup> An American President who promises war, like President George H.W. Bush did in response to Iraq's 1990 invasion of Kuwait, in effect "ties his hands."<sup>91</sup> This is a credible signal because the President will suffer *ex post* audience costs if he or she does not follow through on the threat. An American Pres-

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<sup>89</sup> See Radio and Television Report to the American People on the Soviet Arms Buildup in Cuba, 1 PUB. PAPERS 806, 807-08 (Oct. 22, 1962).

<sup>90</sup> See James D. Fearon, *Signaling Foreign Policy Interests: Tying Hands Versus Sinking Costs*, *supra* note 85, at 70; Branislav L. Slantchev, *Military Coercion in Interstate Crises*, 99 AM. POL. SCI. REV. 533, 545 (2005) (noting that military mobilization both sinks costs and ties hands).

<sup>91</sup> See Radio Address to the Nation on the Persian Gulf Crisis, 1 PUB. PAPERS 10, 10 (Jan. 5, 1991).

ident can send a second type of signal by mobilizing the armed forces or, less immediately, engaging in an arms buildup or constructing certain types of weapon systems.<sup>92</sup> This type of signal is a sunk cost. It generates costs *ex ante*, unlike tying hands, because it requires the expenditure of resources before the final decision on war or settlement. But it does not bear *ex post* audience costs if a threat remains unrealized. Interestingly, tying-hands signals arguably increase the chances of war because they increase future costs if the United States does not engage in a conflict, even if  $W(\text{China})$  and  $W(\text{U.S.})$  remain unchanged. Sunk costs do not have this effect because they do not alter the future values of either war or settlement; once the money is spent, it is spent.

Part III will examine how different domestic constitutional arrangements affect the types of signals sent during international disputes. As I have argued elsewhere, an American President can send credible signals by involving Congress in his decision to go to war, that these signals can be of the tying-hands or sunk-cost variety, and that the advantage of sending signals must be balanced against the nature of the opponent. What has gone relatively unexamined in the literature is the other choice, the one of settlement. Different paths toward the making of international agreements may send different types of signals. These may enhance the credibility of the signal, they may generate different audience costs, and they too may be of the tying-hands or sunk-cost kind. But before we discuss the value of signals in overcoming international disputes, we must still address a second, greater obstacle.

### C. Conflict as a Commitment Problem

The preceding subpart described the information problems that cause war—nations hold private information about their probability of winning and cannot credibly communicate it to the other side. But a second, perhaps more difficult, problem remains even with perfect information: nations may refuse settlement because there is no supranational institution that can meaningfully enforce their commitment. Along another dimension, incentives may arise after the agreement that urge one of the parties to renege. Conceived in this way, the commitment problem may be particularly acute in situations of rapidly changing shifts in the distribution of power.<sup>93</sup> These problems may prevent, in our hypothetical, China and the United States from

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<sup>92</sup> See Fearon, *supra* note 90.

<sup>93</sup> See Powell, *War as a Commitment Problem*, *supra* note 79, at 171–72 (arguing that the inefficient use of power results from rapid shifts in relative bargaining power, not asymmetric information).

reaching an agreement even when perfect information and credible signals exist.

One way to understand the difficulty of the commitment problem is to examine the limitations of the theory that war results from asymmetric information. Examples of civil wars or prolonged fighting highlight the drawbacks. Under the information explanation, such wars result from the failure of each side to credibly communicate its true military capabilities and political resolve, leading to a bargaining failure. But with civil wars, after a few years, if not immediately, warring parties should gain ample information on the resources, organization, and tactics of the other.<sup>94</sup> Yet the war continues.<sup>95</sup> This insight might also apply to crises that develop into wars of long duration. By 1940 and 1941, Great Britain and Germany had been at war for a year and Germany had decided to launch the aerial Battle of Britain as a prelude to invasion. Germany could have sought a separate peace in the West that left Britain alone. War did not continue, it seems, because of German misunderstanding of British resolve and resources, or vice versa. Complete information did not end the fighting. In fact, one could argue that the more the British learned about Hitler, the more they decided that they would fight him.<sup>96</sup>

Recent political science work argues that the real culprit to such bargaining failures is not asymmetric information, but commitment problems.<sup>97</sup> With complete information, states can identify a range of bargains that they will prefer to war. In fact, as the cost of fighting increases, the range of bargains will broaden because both will benefit more by avoiding expensive war. States cannot reach these agreements because of an inability to keep the commitment, not a failure to identify the Pareto-optimal settlement. Work on commitment has identified similar problems in areas other than international relations, such as coups and civil wars, transitions to democracy, government spending, and independent agencies.

Commitment problems will be especially pronounced when the distribution of power between actors changes rapidly.<sup>98</sup> If China and the United States, for example, are trying to reach an agreement over the division of a territory, they are using their power to lock in a cer-

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<sup>94</sup> *Id.* at 173.

<sup>95</sup> See James D. Fearon, *Why Do Some Civil Wars Last So Much Longer than Others?*, 41 J. PEACE RES. 275, 275–76 (2004) (observing that the average duration of civil wars was almost sixteen years in 1999).

<sup>96</sup> See Powell, *War as a Commitment Problem*, *supra* note 79, at 175–76 (stating that Britain and Germany would have fought each other even if they had complete information because the latter demanded more than the former was willing to accommodate).

<sup>97</sup> See Fearon, *supra* note 95, at 291–98; Powell, *The Inefficient Use of Power*, *supra* note 79, at 231; Branislav L. Slantchev, *The Power to Hurt: Costly Conflict with Completely Informed States*, 97 AM. POL. SCI. REV. 123, 128 (2003).

<sup>98</sup> See Powell, *War as a Commitment Problem*, *supra* note 79, at 181.

tain flow of future benefits. As discussed in Part II.B, that division will mirror the balance of power between China and the United States. But if China is rapidly increasing its military power because of explosive economic growth, it will have a strong incentive to renege on the deal and use its better position to seek a greater share of the territory. This may occur even though a share of the pie will be destroyed because of war itself. The agreement might even accentuate this dynamic by sending resource flows to China that will allow it to accelerate its economic growth and accompanying military expansion. Or the agreement may require the United States to expend so many resources to maintain the status quo in the future that it would rather fight now than spend later. Knowing this, the United States will not trust China to keep any commitment it makes in the present and may instead seek war now to lock in its share of resources, rather than face a steeper balance of forces in the future.<sup>99</sup> This explains why international agreements are unlikely to solve situations of first-strike preemptive attack and preventive war, because the attacker has a significant advantage in military resources in the present that will significantly erode in the future.

Domestic political arrangements may help overcome these commitment problems, just as they did with asymmetric information. Political scientists have not yet extended the commitment analysis to include audience costs, but we can see where it might lead. If a democracy has a ruling party and an opposition party, it might be able to make a more credible commitment by giving a veto over any future effort to renege to the opposition party. It could try to commit itself by requiring the expenditure of high levels of political capital to break the agreement in the future. Or it might devote resources to compliance that would be lost in the event of withdrawal, something like the giving of a hostage as part of a peace treaty in the ancient world. Part III will return to the debate over treaty making under the American Constitution to analyze the way that the choice of instruments bears on the problems of commitment and asymmetric information.

### III

#### INTERNATIONAL AGREEMENTS AND THE U.S. CONSTITUTION

This Part uses the tools of Part II to approach the puzzles described in Part I. As with political science studies of why nations choose war, this Part examines why nations cannot make peace. For simplicity, it assumes that two nations in a dispute can choose between war and peace. Peace can occur if a nation backs down and the status quo remains intact or if the parties reach a settlement that allocates

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<sup>99</sup> See *id.*



the resources or territory in line with the balance of power between them. We will leave to another day examination of multilateral agreements that extend beyond individualized disputes.

Part II's model identifies two ways that negotiations can fail despite the presence of Pareto-optimal bargains and the avoidance of the deadweight loss of war. The first is asymmetric information; the second is commitment. Choosing a treaty or the congressional-executive agreement route to make an international agreement may bear on both of these problems. John Setear has observed that using the Article II treaty process can send a costly signal of commitment because it requires more political capital to win the higher majority for approval.<sup>100</sup> Lisa Martin makes a similar point comparing treaties with sole executive agreements.<sup>101</sup> This point confuses the asymmetric information and commitment issues. Treaties and congressional-executive agreements have different trade-offs on these issues because of differences in the timing of important steps in the approval process, the level of political support required, the means of implementation, and the process for withdrawal. Different paths for termination of an international agreement, in particular, have important bearing on the commitment problem.

Hathaway, by contrast, observes that congressional-executive agreements provide more durable commitments than treaties, which enhances the democratic nature of using Article I to make international agreements.<sup>102</sup> It is unclear why democratic theory should want to make it difficult for a nation to renege on its international agreements. In fact, a purely majoritarian system might prefer termination of treaties solely by the President, who is the only federal official, along with the Vice President, elected by the nation as a whole. In any case, Hathaway elides the two different types of problems in making international agreements—credibly revealing private information and the threat of reneging.<sup>103</sup> It is important to understand that both variables are present in international disputes, and the choice of instruments has different trade-offs for their resolution.

It is necessary to underscore a point that frames the following discussion. While the scholarship to date has debated the legitimacy of treaties versus congressional-executive agreements, this Article does not view legitimacy as the critical question. Whether the Constitution demands treaties or democracy demands congressional-executive

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<sup>100</sup> See John K. Setear, *The President's Rational Choice of a Treaty's Preratification Pathway: Article II, Congressional-Executive Agreement, or Executive Agreement?*, 31 J. LEGAL STUD. S5, S28 (2002).

<sup>101</sup> See Lisa L. Martin, *The President and International Commitments: Treaties as Signaling Devices*, 35 PRESIDENTIAL STUD. Q. 440, 446 (2005).

<sup>102</sup> See Hathaway, *supra* note 9, at 1316–38.

<sup>103</sup> See *id.* at 1323–38.

agreements, the political branches continue to use both forms, and the courts show little desire to overturn practice. Scholarly debate over the legitimacy of the use of the congressional-executive agreement to approve NAFTA had little effect on Congress or the executive branch. Nor have recent claims for full interchangeability convinced the President to seek approval of certain types of agreements, such as the rejected Comprehensive Test Ban Treaty or New START, through Article I rather than the Article II process.

Rather, this Article examines the consequences of choosing between treaties and congressional-executive agreements. Part II explains how multiple forms of international agreements are not a problem, but a solution to the problem of bargaining between nations. The availability of both types of agreements allows the United States to choose the amount of information and level of commitment it wants to communicate. This should help the United States overcome the problems of asymmetric information and lack of enforcement that beset negotiations in an international system that lacks strong institutions.

#### A. Choice of Instruments as Informational Signals

As demonstrated in Part II, one of the chief obstacles to the settlement of an international dispute is asymmetric information. Parties hold private information that bears directly on the expected value of war. Without that information, the other party cannot determine the range for an appropriate bargain. This problem is compounded by the possibility that an opponent is bluffing.

Consider how the choice of instruments might affect this dynamic. In the context of the decision whether to go to war, I have argued elsewhere that a U.S. President could seek congressional support for a conflict as a way to send a credible signal of the nation's private information concerning its ability to prevail in a conflict.<sup>104</sup> Placed in the U.S.–China example, this would make the United States' expected value of a war

$$W(\text{U.S.}) - AC(\text{U.S.}) = P(\text{U.S.}) \times V(\text{U.S.}) - C(\text{U.S.}) - AC(\text{U.S.}),$$

where  $AC(\text{U.S.})$  refers to audience costs. In the political science literature, scholars think of audience costs as the political price that the President will incur by publicly making a threat against another nation that he does not fulfill. Here, we can think of  $AC(\text{U.S.})$  as the political cost of seeking the approval of another branch of government for support. Assuming that the costs of a conflict and the value of the territory to the United States remain the same regardless of the signal, the

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<sup>104</sup> See Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512, 2530–31 (2006).

expensive signal reveals information to China about the magnitude of  $P(\text{U.S.})$ , the probability of winning a conflict.

Audience costs play a similar role in reaching international agreements. If the agreement, in our hypothetical, is a way to avoid war, then audience costs can again reveal  $P(\text{U.S.})$ . In fact, it might do this in a more direct way because of the difference between making a threat before a conflict and of approving either a treaty or a congressional-executive agreement afterward. When the United States makes an international agreement, the President first negotiates and signs the treaty or congressional-executive agreement and then submits it to the Senate (if the former) or to Congress (if the latter). The agreement does not take effect until after legislative approval, followed by presidential ratification. The other party, here China, can also decide to reject the agreement as it waits to see the results of the approval process in the Senate or Congress.

In the course of legislative approval, the executive branch usually reveals information to the Senate or Congress in public to convince it to approve. The Senate Foreign Relations Committee, for example, will hold public hearings where executive branch officials will testify under oath about the benefits of international cooperation to the national interest. One inevitable question is whether the United States would be better off if the Senate did not ratify the agreement. The executive branch would have to explain what  $W(\text{U.S.})$  would be if the dispute escalates into war. If the value of the territory remains constant, the public testimony would reveal the executive branch's estimate of its probability of winning and the cost of the war. Misrepresenting this information to the Senate would have costs, including sanctions against the executive branch officials, difficulties for the President in the approval of future agreements, and disruption of foreign policy in the subject matter of the treaty. Executive branch testimony and Senate consideration provides important private information that can be seen as part of the negotiating process itself, since it occurs after the President has signed the treaty, but before it is approved and ratified.

This should provide a powerful help to reaching an agreement. Consider again the U.S.-China hypothetical. Suppose that the United States and China reach a tentative agreement on allocating the territory in dispute. As Part II showed, this division will depend upon  $P$  and the deadweight loss of war,  $C$ . If China has a 50% chance of winning a conflict, it should get approximately half of the territory, plus or minus the deadweight losses of war to the United States and China. The exact outcome of the settlement negotiations would depend on variables not included in our model. When the Senate considers the proposed treaty, members of the Foreign Relations Committee will

ask whether the President should have gotten a better deal. To justify the negotiated division, the executive branch will have to reveal to the Senate its probability of winning and its estimates of the cost of war. If the revealed information does not match up with China's understanding of  $P(\text{U.S.})$  and  $C(\text{U.S.})$ , it can refuse to ratify the agreement. If the President were to say, for example, that the agreement is a great deal for the United States, because  $P(\text{U.S.})$  was really only 40%, China will not ratify the agreement and may choose war instead because it will have a 60% of winning the whole territory.

Up to this point, there is no difference between the Article II treaty process and the Article I statutory method. The choice of instruments will not affect the type of information communicated about the probability of winning, but rather the strength of its credibility beyond the political costs that a President would suffer for misrepresenting information to Congress. Taking the Article II route requires the President to convince two-thirds of the Senate to agree to the treaty. A blocking coalition of thirty-four Senators need represent the population of only the smallest one-third of states by population. This could be as small as 7.4% of the population (the amount of the nation's population contained by the seventeen smallest states), or 22.7 million out of the U.S. population of 307 million in 2009.<sup>105</sup> By contrast, the minority needed to block legislation in the Senate can be as small as 16% of the population (the population of the twenty-five smallest states).

The Article I route, by contrast, requires simple majorities of both the House and Senate. To get through the House, the President need only convince the representatives of 51% of the majority of the population. To get through the Senate, the President must only persuade fifty-one Senators, instead of sixty-seven as with an Article II treaty. This assumes that a simple majority of the Senate does not actually represent 51% of the population. It might. But if the twenty-five smallest states vote together, enactment of a statute requires the other twenty-five to cooperate—84% of the population. In fact, to take account of Senate rules, a minority opposed to a congressional-executive agreement would need the votes of only the smallest twenty states, which represent about 10% of the population—enough votes to sustain a filibuster that would prevent the bill from coming to a vote. Nevertheless, the President will consume more political capital to con-

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<sup>105</sup> Wyoming, the smallest state by population, has 544,270 people; Utah, the seventeenth smallest state, has 2.7 million inhabitants. See Table 1. *Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2000 to July 1, 2009*, U.S. CENSUS BUREAU, <http://www.census.gov/popest/states/NST-ann-est.html> (last visited Aug. 27, 2011) (follow "Excel" hyperlink).

vince the representatives of 93% of the population, via a treaty, rather than the representatives of 84% of the population, via a statute.

In the terminology of our earlier equation, choosing the treaty process over the congressional-executive route will increase audience costs. That increase will be equivalent to the additional political capital needed to win the votes of 9% of the population (the difference between 84% of the population for a statute and 93% of the population for a treaty). It may be the case that this is not a great amount, but the marginal difference allows the United States to increase the cost, and hence the credibility, of its signal. Treaties thus provide a more credible means for the United States to reveal private information to its negotiating partner than the enactment of a statute.

In fact, it seems that the United States might be willing to incur audience costs even beyond the expected value of war if it expected to get an agreement that it values much more than going to war. Consider how the government would determine whether to continue incurring audience costs or to stop and either settle or go to war. On the margin, the government would incur an additional unit of audience costs until the marginal benefit of doing so equals the marginal cost. The marginal benefit is the increase in potential settlement value if the parties agree to settle and the marginal cost is the additional unit of audience costs. As more information is revealed through audience costs, China will refine its beliefs about the probability that the United States will win, and the costs of war to the United States. However, at some point the release of additional information will cease to be rational because the additional unit of audience costs will exceed the increase in settlement value to the United States due to the large quantity of already available data. If the potential settlement value is much greater than the expected value of war, the United States may determine it is rational to increase audience costs beyond even the expected value of war if it believes that China is likely to settle once it has all of the relevant information on *P* and *C*.

A watching adversary will see that the President's political efforts to win legislative approval make it less likely that the United States is bluffing. The more expensive the audience costs, the less likely that the President has misrepresented the probability of American victory. The different paths to the approval of an international agreement allow the United States to send varying signals about private information. While the international relations literature does not further distinguish audience costs, we can identify two types of information communicated through the advice-and-consent process. The first is simply the costs of the political effort to secure Senate or congressional approval. A President will expend political capital to build a majority or supermajority to approve the agreement, just as the execu-

tive will incur costs to convince Congress to pass its domestic legislative program. Presidents may take time and resources away from other priorities, offer legislators favors for their votes, and risk public support to push an international agreement forward. These costs mirror the costs that Presidents incur to convince Congress to enact their legislative agenda. Political audience costs send a costly signal, but the nature of the signal itself is not important, only the cost.

A second dimension of the signal is the substance of the information communicated during the advice-and-consent process. Presidents will need to explain to the Senate the reasons why a treaty is in the national interest. The Senate Foreign Relations Committee will hold hearings in which administration witnesses will respond, under oath, to questions about the agreement. This will reveal in public more information about the United States' expected value from the agreement, which will give the other party more information on the value of the asset and the probability of victory in the event of a conflict. Senators, for example, might demand that the administration explain why a treaty does not give away the store, but instead carries nonobvious advantages for the United States. This signal is even more credible if the Senate is controlled by the opposite political party from the President's, which will be more demanding and harder to convince.

The difference between the two types of information—the costs of the signal and its content—is analogous to the difference between quantity and quality. The former involves the amount of resources expended by the executive branch to get a treaty through the Senate. The latter involves the information communicated as part of that process. A bargaining state, however, might discount both as a bluff. China, for example, might suspect that the President and Senate are colluding to inflate the political costs of advice and consent to a treaty settling its dispute with the United States. The only reason why China might believe the audience costs is if it is confident in the reliability of the Constitution's division of the treaty-making authority between the President and the Senate and the institutional independence of each. Or, the other party might take the division of the treaty-making power so seriously as to doubt whether it has won an equitable division of the bargaining surplus if the President wins a supermajority in the legislature. China, for example, may believe that it negotiated a good deal for itself only if the President can convince a bare majority of Congress to agree. If two-thirds of the Senate, however, readily approve a treaty, China might believe that it has given up too much to the United States—much in the same way that a car buyer might believe he or she has paid too much if a dealer agrees right away to the first offer.

The Constitution addresses the first concern, bargaining theory the second. The more the Constitution truly organizes and limits power horizontally within the federal government, the more credible audience costs will be. If formal constitutional rules, for example, bear little resemblance to actual political practice—as occurred in communist countries during the Cold War—the other nation may not take seriously any apparent political exertions to win approval of a treaty. Conversely, the more that the political branches obey the Constitution, even incurring inconvenient political costs to obey its separation of powers, the more the other nation will believe a costly signal. The second problem can be thought of as a transaction cost. Bargaining theory predicts that the two parties to an international dispute should reach an agreement that avoids the deadweight costs of war, should they be able to overcome the problems of asymmetric information and commitment failure. It does not necessarily predict, however, that the two parties will divide the surplus precisely in line with their relative power. Nonetheless, if two nations receive information that the division is not in line with their relative power, they will seek to renegotiate the agreement until they come close. At that point, the Senate may approve the agreement anyway, because it knows that the treaty will allow the United States to avoid the costs of war and that it cannot improve its position any further.

These differences in the nature of signals might provide a partial explanation for the use of treaties for major agreements involving political alliances like NATO or arms-control agreements like New START or the Anti-Ballistic Missile (ABM) Treaty, and the use of congressional-executive agreements for economic matters like the IMF, Bretton Woods, NAFTA, and the WTO. The former address matters dear to a nation's security from attack, and as such will involve capabilities that a nation will usually keep secret, such as military forces and deployments, readiness and spending, and types of weapons. To reach agreement, for example, the parties to an arms-control agreement must make credible disclosures about the size and shape of their arsenals.

With other types of agreements, the need to reveal private information may prove less pressing. Economic agreements may suffer less from problems of asymmetric information. Nations will already have disclosed publicly a great deal of information about their economies for reasons unrelated to the international agreement. The United States, for example, regularly reports for domestic reasons a host of statistics on economic growth, employment, industrial activity, and labor and capital deployment. It requires companies to release a great deal of information to ensure the smooth functioning of its markets. Private economic analysts have their own incentives to determine the

effects of a trade agreement on different industry segments. A government will possess less private information about the future effects of an international economic agreement, and so it will have less need to send a costly signal to reveal it.

There is one more feature of the communication of information worth mentioning. Part II distinguishes between informational signals that "tied hands" and those that were sunk costs. The former costs relatively little but increases instability, while the latter are costly but improve stability because once spent they are lost. Viewed on this axis, treaties fall more along the lines of a tying-hands signal, while congressional-executive agreements evoke more of a sunk cost. Treaties promise that the United States will live up to certain commitments, but they still require further implementing steps, such as the passage of legislation or the destruction of weapons, that will take place in the future. Congressional-executive agreements, by contrast, combine the international agreement and the implementing legislation in one package. The statutes adopting WTO and NAFTA both approved the agreements and made changes to domestic tariff and trade laws necessary to comply with their terms. This may mean that while Article II treaties reveal more private information, they also raise the political stakes for the President because of the need to follow through on promises made both to the foreign treaty partner and before domestic political audiences. Because Article I congressional-executive agreements combine the making of the international agreement with its domestic implementation, its enactment represents something more akin to the sunk cost of political capital.

## B. Choice of Instruments and Commitment

The choice of instruments may have far more to do with the second obstacle to making international agreements. Even if nations have successfully revealed private information and identified their bargaining range, they will still have difficulty in making credible commitments to keeping their agreement. Unlike the domestic contracting setting, there is no supranational government that can compel nations to keep their promises. This had led to some formal work on the causes of war to conclude that states might fight even if they have complete information, compounding the inefficiency puzzle of war.<sup>106</sup> Commitment problems will be especially pronounced in situations with rapid changes in the balance of powers between the two states, or where the division of the good itself will cause or accelerate shifts in the distribution of power.

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<sup>106</sup> See, e.g., Powell, *War as a Commitment Problem*, *supra* note 79, at 194–95.



The choice of instruments can play some role in providing what the international system lacks. The Framers may have even been aware of the problem, though they would not have thought of it in modern terms. One of the chief problems with the Articles of Confederation was the inability of the Continental Congress to ensure compliance with the 1783 Treaty that ended the Revolutionary War.<sup>107</sup> Congress itself had no power to legislate, tax, or spend, and instead had to rely on the states to carry out its requests. It could only ask the states politely to obey the 1783 Treaty. States refused. Several, for example, refused to honor pre-Revolutionary War debts between Americans borrowers and British lenders. This caused Britain to refuse, as required under the treaty, to turn over territories and strategic forts along the northwestern frontiers.<sup>108</sup> Congress could not compel states to lower trade barriers to live up to proposed trade agreements.<sup>109</sup> The Framers realized that the national government's failure to enforce existing treaties would discourage other states from making agreements with the United States in the future. Failure to live up to past commitments would make it difficult to convince other nations, in an international system characterized by anarchy, to believe any promises.

Alexander Hamilton, writing as Publius in the *Federalist Papers*, put the problem clearly: "The treaties of the United States, under the present constitution, are liable to the infractions of thirteen different Legislatures, and as many different courts of final jurisdiction, acting under the authority of those Legislatures."<sup>110</sup> Ensuring that the United States lived up to its international promises was challenging, to say the least. "The faith, the reputation, the peace of the whole union, are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed."<sup>111</sup> Nations would have no credible belief that the United States could commit. "Is it possible that foreign nations can either respect or confide in such a government?"<sup>112</sup>

Domestic constitutional arrangements, some Framers realized, might help overcome these commitment problems. This, in fact, was one of the Framers' explanations for the two-thirds requirement for

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<sup>107</sup> The story of the problem in enforcing treaties during the "Critical Period" between the Revolution and the Constitution is told in John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2013-24 (1999).

<sup>108</sup> See, e.g., THE FEDERALIST NO. 15, at 91 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

<sup>109</sup> See FREDERICK W. MARKS III, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION 52-95 (1973).

<sup>110</sup> THE FEDERALIST NO. 22, at 144 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

the approval of treaties by the Senate. Responding to anti-federalists critical of the inclusion of treaties in the Supremacy Clause, John Jay responded as Publius: "These gentlemen would do well to reflect that a treaty is only another name for a bargain."<sup>113</sup> Jay continued: "[I]t would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely*, but on us only so long and so far as we may think proper to be bound by it."<sup>114</sup> Jay thought the commitment problem so serious that he suggested in Federalist No. 64 that the United States could neither withdraw from a treaty without the permission of the other state nor terminate one by a simple act of Congress.<sup>115</sup> Jay appeared to believe that terminating a treaty would require both the President's decision and approval by two-thirds of the Senate.

Reading the Constitution in this manner would have allowed the national government to use its internal separation of powers to send credible signals of commitment. In the context of war, political scientists have pointed to public declarations by a President of ultimatums or demands as credible signals because of the domestic political costs if the President does not follow through.<sup>116</sup> Here, the audience costs go beyond mere threats and the attendant gains for the opposition. If the President could not terminate a treaty under the rules of the domestic Constitution without the approval of two-thirds of the Senate, the use of the Article II process would be a powerful signal of commitment. In this case, Article II's supermajority requirements would work in the nation's favor. As little as 7.4% of the population could prevent any effort by the United States to renege on its international promises. While the two-thirds termination requirement could not permanently guarantee a commitment to an agreement, it would significantly raise the political price for a President intent on reneging.

Constitutional practice, however, did not develop in the direction that Jay predicted. Within a decade of Federalist No. 64, the United States terminated its first treaty. The United States withdrew from the 1778 Treaty of Alliance with France both unilaterally and by statute, ruining both of Jay's commitment devices. The death knell for the French treaty even occurred as early as the beginning of President Washington's second term. Under attack by nations seeking to restore the Bourbon monarchy, the French called on the United States to provide military assistance from 1792 to 1793.<sup>117</sup> President Washington decided instead to interpret the 1778 Treaty as allowing the

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<sup>113</sup> THE FEDERALIST NO. 64, at 436–37 (John Jay) (Jacob E. Cooke ed., 1961).

<sup>114</sup> *Id.* at 437.

<sup>115</sup> *Id.*

<sup>116</sup> See *supra* notes 90–92 and accompanying text.

<sup>117</sup> See Treaty of Alliance, U.S.-Fr., art. XI, Feb. 6, 1778, 8 Stat. 6 (calling upon the United States to guarantee French possessions in America).

nation to remain neutral in the fighting.<sup>118</sup> He did not consult Congress or the Senate or seek its approval. Congress eventually terminated the treaty,<sup>119</sup> at President Adams' request, and began an undeclared naval war with France in 1798.

A credible signal might still be available if congressional consent to termination continued as a constitutional requirement. Under current population figures, 16% of the population—the smallest twenty-five states—could still block an effort to terminate a treaty in the Senate, if not the House. But by the time of Abraham Lincoln, Presidents had unilaterally withdrawn the nation from treaties without the consent of either the Senate or Congress.<sup>120</sup> Today, the United States terminates treaties sometimes by congressional act, but more often by sole presidential decision. President George W. Bush, for example, terminated the ABM Treaty in 2002 without seeking congressional approval.<sup>121</sup> As with the 1778 Treaty with France, presidential interpretation of the ABM Treaty had already set the stage for its termination. Beginning in 1984, Presidents from Reagan through Clinton interpreted the agreement to allow the United States to research and develop ABM systems for eventual deployment on the West Coast.<sup>122</sup> While the Presidents needed congressional cooperation to fund the development of ABM technology, they never sought congressional approval for their reading of the treaty.<sup>123</sup>

While members of Congress have opposed this practice at various times, the courts have refused to intervene. The constitutional question of presidential treaty termination did not reach the courts until the United States withdrew from the mutual defense treaty with Taiwan in 1979. In *Goldwater v. Carter*, the Court of Appeals for the D.C. Circuit upheld the termination as part of the President's executive

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<sup>118</sup> See George Washington, A Proclamation (Apr. 22, 1793), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 156 (James D. Richardson ed., 1896).

<sup>119</sup> See Act of July 7, 1798, ch. 67, 1 Stat. 578.

<sup>120</sup> See John C. Yoo, *Treaty Interpretation and the False Sirens of Delegation*, 90 CALIF. L. REV. 1305, 1320 n.94 (2002).

<sup>121</sup> Remarks Announcing the United States Withdrawal from the Anti-Ballistic Missile Treaty, 2 PUB. PAPERS 1510, 1510 (Dec. 13, 2001).

<sup>122</sup> See David Edward Grogan, *Power Play: Theater Ballistic Missile Defense, National Ballistic Defense and the ABM Treaty*, 39 VA. J. INT'L L. 799, 814 n.82 (1999) (describing how the Reagan and Bush administrations took an expansive view of the interpretation of the treaty, and the Clinton administration initially took a restrictive view); Brian T. Kennedy, *Mad vs. Missile Defense: How the ABM Treaty Undermines the Security of the United States and its Allies* 4 NEXUS 99, 106 (1999) (highlighting how the Clinton administration changed its tune at the end of its administration and switched to the more expansive view of prior Republican administrations).

<sup>123</sup> See Yoo, *supra* note 33, at 858–64 (describing the Reagan administration's controversial effort to reinterpret the ABM Treaty to permit research and development into space-based antimissile defenses).

power in foreign affairs.<sup>124</sup> Comparing the issue to the President's power to remove executive branch officials without congressional consent, the court found that the two-thirds Senate approval requirement was a narrow exception from the President's constitutional authority and that it did not extend further to the power to end agreements.<sup>125</sup> The Supreme Court could not agree on a majority opinion.<sup>126</sup> Four Justices found that the case presented a nonjusticiable political question, Justice Powell found the case unripe because Congress as an institution had not taken any steps to thwart the President, and Justice Brennan reached the merits and agreed with the D.C. Circuit.<sup>127</sup> The Court's refusal to intervene allowed President Carter's unilateral termination of the mutual defense treaty to take effect.

Article II treaties, therefore, may send a relatively credible signal about the reliability of private information. But they send a less credible signal about the United States' future commitment to keeping its promise to another nation. If the Constitution required the President and Congress to agree to the withdrawal from an international agreement, the political costs of renegeing on the promise would be higher, which would send a costly signal of commitment. Commitment does not come from international enforcement of promises, but from raising the domestic costs for a President to implement his foreign policy. A requirement of congressional or Senate consent would require the President to expend political capital and take public positions that would hurt his standing with the electorate if unfulfilled. In the political science models discussed in Part II, the Constitution could have raised the audience costs for any treaty termination, thereby allowing a credible signal of commitment to be sent. But terminating a treaty does not require the President to receive the consent of another coordinate branch of government. By allowing unilateral presidential termination of treaties, constitutional practice has reduced their utility as a credible signal of commitment.

Treaty termination, however, is not wholly costless. The domestic cost realized by the President will come from the political process rather than from the constitutional allocation of powers. This may be high initially, but may well drop off in the future. Criticism of a President's decision to unilaterally terminate a treaty will likely come most directly from the Senators who gave their advice and consent. But as time passes, the holders of Senate seats may change and the new officeholders may have little to no attachment to treaties approved by

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<sup>124</sup> See *Goldwater v. Carter*, 617 F.2d 697, 703–09 (D.C. Cir. 1979), *vacated*, 444 U.S. 996 (1979).

<sup>125</sup> See *id.* at 703–04.

<sup>126</sup> *Goldwater v. Carter*, 444 U.S. 996 (1979).

<sup>127</sup> See *id.* at 1002–06 (plurality opinion of Rehnquist, J.); *id.* at 997–98 (Powell, J., concurring); *id.* at 1007 (Brennan, J., dissenting).

their predecessors. Any political opposition to presidential termination will have more to do with the specific policies governed by the treaty than any strong desire to keep commitments made by past Senates. These costs will be even smaller if the same political party both controls the Presidency and holds a majority in Congress, which would give the latter more political incentive to leave a termination unchallenged.

Congressional-executive agreements, by contrast, may present the opposite trade-off on signaling information versus commitment. Adopting an international agreement by the Article I statutory route sends a less credible signal about the reliability of revealed information because of the lower number of votes required for approval. But because of differences in terminating procedures, congressional-executive agreements may send a stronger signal than Article II treaties about commitment. Unlike treaties, congressional-executive agreements require legislative approval before termination because of their different constitutional pathways.

Recall the constitutional difference between treaties and congressional-executive agreements. Treaties are executive acts—hence the location of the advice-and-consent clause in Article II alongside the similar provision for the appointment of executive branch officers. The location of the treaty power in Article II was an important piece of evidence for the courts in *Goldwater* in agreeing that the President could terminate treaties and that the courts had no authority to review the decision.<sup>128</sup> The constitutional argument for presidential termination of treaties mimics the argument for presidential removal of subordinate officers. While the Senate must consent to the appointment of major officers of the government, the Constitution remains silent about their removal. The Constitution has been understood to grant removal to the President, except in certain circumstances, because the Senate's consent is a specific exception to what would have been a general executive power to both appoint and remove unilaterally. Similarly, the Constitution is silent about treaty termination, but the lower courts have read it as remaining with the President because the Senate's advice-and-consent role is a specific exception to a general executive authority to make or terminate treaties.<sup>129</sup>

Congressional-executive agreements, by contrast, are statutes. They are passed using the same process as other laws enacted within Congress's Article I, Section 8 powers. They combine the approval of

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<sup>128</sup> See *Goldwater*, 617 F.2d at 705.

<sup>129</sup> *Id.*; see also *Kucinich v. Bush*, 236 F. Supp. 2d 1, 2, 14, 18 (D.D.C. 2002) (applying Justice Rehnquist's plurality opinion in *Goldwater* and concluding that the plaintiffs' challenge to President Bush's unilateral withdrawal from the ABM Treaty without congressional approval was a nonjusticiable political question).

the international agreement with the necessary domestic implementing legislation. As with removal or treaties, the Constitution only sets out the process for the affirmative enactment of a statute. Article I does not explicitly address the negative act of terminating the law. Unlike removal or treaties, however, the Constitution has not been understood to allow for alternate methods for reversing an earlier statute. If Congress or the President wants to terminate a federal law, they must enact a second law overriding the first. One exception might be judicial review, but a court's striking down of a federal law conceptually amounts to no more than judicial refusal to enforce a law, rather than the actual removal of the law from the U.S. Code. Generally, statutes must be reversed by later-in-time statutes.

Hence, a President who wishes to withdraw from a congressional-executive agreement must convince a majority of Congress to consent. And the supermajority nature of enactment works against breaking the international commitment. The President needs not only 51% of the House, but also fifty-one Senators. If the twenty-five smallest states oppose terminating the congressional-executive agreement, the President may need to persuade Senators who represent as much as 84% of the population to consent. And, taking into account the Senate filibuster rule, the President may even need to win over Senators who represent as much as 90% of the nation's population. That is not quite the 93% needed for two-thirds of the Senate, but a high political cost nonetheless.

The difference between treaty and statutory termination allows the United States to send signals of varying credibility about its commitment to keep an international promise. Treaties will send a lesser signal of commitment than congressional-executive agreements because of the President's power to unilaterally terminate the former. The President's main domestic cost will arise from opposition political parties and interest groups that support the policies in the treaty. A President would suffer those same costs in terminating a congressional-executive agreement, but he must go to the greater effort of assembling majorities in both the House and Senate. These audience costs could be significant, especially if opposition aligns along differences in state geography or population. The additional political resources required to terminate a statute provides a credible signal, at the time of the signing of the international agreement, of commitment.

This trade-off between treaties and congressional-executive agreements may help explain some consistencies in U.S. practice. Some scholars, such as Ackerman and Golove, insist that the instruments

should be fully interchangeable,<sup>130</sup> and others, such as Hathaway, argue that they already are.<sup>131</sup> These scholars claim that congressional-executive agreements are easier to ratify and more justified as a matter of democratic theory. Nevertheless, the United States has continued to use treaties for significant political agreements, such as the Treaty of Versailles, U.N. Charter, NATO, and the settlement of the Cold War in Europe. It still chooses the Article II treaty form for arms-control pacts, such as the ABM Treaty, SALT, the INF and START agreements, the chemical weapons convention, the Comprehensive Test Ban Treaty, and now the New START. If full interchangeability were correct, Presidents should always use the Article I route, even for political and arms-control agreements. In fact, if interchangeability were correct, a President could take a treaty rejected by the Senate (such as the Treaty of Versailles or the Comprehensive Test Ban Treaty) and resubmit it for simple majority approval as a statute. This appears to have never happened.

Supporters of interchangeability might claim that Presidents still choose treaties because the Senate demands it. Senators who are concerned about maintaining their institution's prerogatives could threaten to block any international agreements that come through Article I, rather than Article II. The smallest states should have the greatest interest in preserving the Senate's constitutional place. They demanded the creation of the Senate as the price of the Constitution's creation and ensured that the Senate would have a veto over any form of federal lawmaking.<sup>132</sup> It would require the twenty-five smallest states, which today represent 16% of the population, to band together to block all congressional-executive agreements, so that a mere 7% of the population through the one-third smallest states can block any future treaty. Ackerman and Golove, however, claim that the Senate gave up any effort to play defense in the wake of World War II, when it allowed the IMF and Bretton Woods through as congressional-executive agreements, rather than treaties.<sup>133</sup> Nor did any defenders of the Senate's prerogatives appear when NAFTA—perhaps the last international agreement to spur widespread public debate (Vice President Gore publicly debated 1992 presidential candidate Ross Perot on national radio and television over NAFTA's merits)—went through Congress by simple majorities.<sup>134</sup>

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<sup>130</sup> See *supra* Part I.

<sup>131</sup> See *supra* Part I.

<sup>132</sup> See, e.g., Bradford R. Clark, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 80 TEX. L. REV. 327, 330–31 (2001).

<sup>133</sup> See *supra* note 48 and accompanying text.

<sup>134</sup> The Gore–Perot debate on NAFTA was hosted on CNN's "Larry King Live" show on November 10, 1993. James Gerstenzang & Paul Richter, *Gore, Perot Tangle in Heated*

The interchangeability puzzle is not really about why congressional-executive agreements have not fully replaced treaties. It is about why the United States continues to use Article II treaties, and in fact reserves them for some of the most important international agreements. Normative justifications rooted in democratic legitimacy or constitutional interpretation cannot provide an answer. Instead, the consequences of the choice of instrument hint at the solution. Treaties strike a particular trade-off: they can reveal significant private information in a credible manner, but with a lower signal of commitment. Congressional-executive agreements reveal private information less credibly, but they send a more costly signal of *ex post* commitment. This may make treaties particularly effective for security-related agreements such as arms-control or military alliances. In these areas, information asymmetries may prove to be the more difficult obstacle to cooperation. A nation will start out with less access to public information about the other side's military capabilities and resources, particularly its probability of prevailing in any conflict (our *P* variable). It will have serious concerns about bluffing, especially in the presence of rapid shifts in the balance of power. A mistaken decision might result in the direst consequences: military defeat, reduced territory, and loss of lives and resources (a high *V* variable).

In these circumstances, choosing the Article II process can help overcome the serious credibility issues in revealing private information. At the same time, credibility of commitment may not be as important. Nations may want to have an easier escape hatch for treaties that involve vital national interests. With arms control, for example, the United States may want to reveal to the Soviet Union that its antiballistic missile program is fairly primitive and easily dismantled. But it may also want to reserve the ability to pull out of the treaty fairly quickly in the future because of a change in circumstances. That change may have little to do with the Soviet Union and more to do with a threat from another nation, such as North Korea, which might develop an intercontinental ballistic missile capability and nuclear weapons that could be deterred by a small-scale ABM system. The United States, in fact, might expect the Soviet Union to terminate quickly too, should its vital national interests come under threat. Arms-control treaties explicitly recognize this fact by making provision for unilateral withdrawal under such conditions. Article XV of the ABM Treaty, for example, set out that "[e]ach Party shall, in exercising its national sovereignty, have the right to withdraw from this



Treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests."<sup>135</sup>

Congressional-executive agreements, by contrast, would prove better suited for situations where the United States has less need to reveal private information and more need to show a credible commitment. Economic agreements could fall into this category. As argued earlier, there may be little private information that needs to be revealed to reach an agreement. Commitment, however, may prove the more difficult challenge. Trade agreements will encourage investments, such as in manufacturing plants or distribution and retail facilities, to take advantage of reduced tariffs and other trade barriers. Private actors, however, will have some reluctance to invest if they are unsure about the long-term commitment of the United States to the agreement. Making it more difficult for the President to terminate a trade agreement will increase confidence that the United States will comply with its obligations.

This explanation of the congressional-executive agreement draws on the same intuition as rational choice explanations for the separation of powers. Some political scientists have argued that the separation of powers may have emerged in seventeenth- and eighteenth-century England as a way for monarchs to promise not to expropriate the property of the upper classes.<sup>136</sup> Without that commitment, the Crown would have had difficulty convincing investors to lend it money for foreign wars and domestic expenses. A parallel account describes judicial independence as a valuable commitment device for governments that want to encourage private and foreign investment in their economies. Judicial review vests an independent body with the power to block an effort to nationalize investments. Congressional-executive agreements similarly allow 51% of the House or a blocking minority in the Senate to exercise a form of review over the President's decision to terminate an international pact.

A related point is worth making regarding the choice of instruments. If treaties reveal information more credibly but show weaker signals of commitment, and congressional-executive agreements reveal information less credibly but provide greater signals of commitment, then two instruments remain missing: (1) a form of agreement with less credible information transmission and weak signals of commitment, and (2) a form with highly credible information transmission and strong signals of commitment. This would give the United

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<sup>135</sup> Treaty on the Limitation of Anti-Ballistic Missile Systems, U.S.-U.S.S.R., art. XV, May 26, 1972, 23 U.S.T. 3435.

<sup>136</sup> See Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803, 817-20 (1989).

States a full range of instruments to tailor to information asymmetry or enforcement difficulties.

It may come as a surprise that while practice has provided for one, it has precluded the other. Sole executive agreements, which are outside the scope of this Article, emerged alongside the congressional-executive agreement in the New Deal and post-World War II period as another means of reaching international agreements.<sup>137</sup> The President alone holds the power to make and terminate sole executive agreements without approval or implementation by Congress. Like congressional-executive agreements, their constitutional place has rested uneasily.<sup>138</sup> They can be understood not just as a President's promise to use his singular constitutional powers to follow a promised policy, but as a less credible signal of revealing information that has the same commitment value as a treaty.

Still missing is an instrument that combines a high credibility of information with strong commitment signals. On this point, perhaps a treaty-exclusivist view may have had it right. There is no strong reason to read the Constitution to require that two-thirds of the Senate has to approve the termination of a treaty, though it would mirror the formal symmetry for the making and ending of statutes. In fact, when compared to the adjacent Appointments Clause, the natural reading would be that the termination of a treaty, like the removal of an officer, falls within the President's executive power. This result coheres with the overall practice and, I would argue, the original constitutional design, in vesting the President with control over foreign policy. Nevertheless, this reading of the Constitution removes from the nation's tool chest an instrument that could send the most credible signals on information and commitment, and hence lead to the most durable international agreements.

Non-self-execution of treaties, however, may have provided a level of commitment that moves toward filling this gap. No constitutional procedure currently approximates the informative and costly signal transmitted by a two-thirds requirement for both making and terminating a treaty. The only constitutional process that comes close is the consent required for constitutional amendment of two-thirds of the

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<sup>137</sup> See CONG. RESEARCH SERV., 103D CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 14–16 (Comm. Print 1993). While these nontreaty numbers include both congressional-executive agreements and sole executive agreements, most of these agreements appear to have undergone approval by both houses of Congress.

<sup>138</sup> See, e.g., Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1654–60 (2007) (disputing that the President may constitutionally make sole executive agreements with the force of federal law); Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133, 218–35 (1998) (concluding that, under the original understanding of the Constitution, significant executive agreements required implementing legislation).

Congress and three-quarters of the states, which is somewhat more difficult. Non-self-execution, however, requires that certain treaties not take effect domestically without implementing legislation.<sup>139</sup> As with congressional-executive agreements, scholars dispute how broad the doctrine reaches—some argue that it only includes treaties that promise future action, while others believe it includes treaties that regulate matters resting within Congress's Article I, Section 8 powers.<sup>140</sup> Regardless of the doctrine's breadth, most agree that the Senate can condition its approval of a treaty with a requirement that it not take effect without further implementing legislation.<sup>141</sup>

Non-self-execution provides the political branches with an instrument that comes close to filling the gap created by the executive's unilateral termination of treaties. Non-self-executing treaties still require two-thirds of the Senate for approval, which preserves the advantage over congressional-executive agreements for overcoming situations of asymmetric information. At the same time, non-self-executing treaties require Congress to enact regular legislation to live up to the terms of the international obligation. As a formal matter, terminating the treaty will not undo the accompanying implementing statute unless Congress enacts a repealing law. This signals commitment at the same level of intensity as a congressional-executive agreement, and greater than for a normal treaty. Non-self-execution has received harsh criticism from many international law scholars, despite the Supreme Court's long and continuing application of the doctrine. Ironically, these scholars criticize non-self-execution for making American compliance with international obligations suspect,<sup>142</sup> while missing its advantages in overcoming bargaining obstacles to making agreements in the first place.

Treaties may have one last instrumental advantage over congressional-executive agreements. Such advantage derives from Schelling's insight that a rational actor, under certain circumstances, might want to act irrationally so as to gain an advantage in conflict resolution. "[T]he power of a negotiator often rests on a manifest inability to make concessions and to meet demands."<sup>143</sup> Schelling further observed that an executive negotiating a settlement with another nation

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<sup>139</sup> See *Medellin v. Texas*, 552 U.S. 491, 505 n.2 (2008).

<sup>140</sup> For different perspectives on non-self-execution, see Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095, 2095 (1999) (self-execution); Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2154 (1999) (self-execution); John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2233–57 (1999) (non-self-execution).

<sup>141</sup> This stems from Chief Justice John Marshall's early recognition of non-self-execution in *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 307–16 (1829).

<sup>142</sup> See Flaherty, *supra* note 140; Vázquez, *supra* note 140.

<sup>143</sup> SCHELLING, *supra* note 78, at 19.

would have more credibility in establishing a firm position if it is evident that he must seek approval from a legislature that will only accept a certain range of options.<sup>144</sup> This intuitively makes sense. If the President can only agree to treaty terms that two-thirds of the Senate will accept, the United States has committed itself to a limited range of outcomes. As a device, it is similar to Cortez's decision to burn his ships as a signal that he would not accept retreat as an option.

Scholars have since developed this conjecture into a theory. They conclude that a bargaining advantage will accrue to a nation that must seek ratification after an agreement is reached.<sup>145</sup> Even though the domestic constraints narrow the executive's negotiating flexibility, they send a credible signal that the President can only agree to certain options and not others. Some of the scholarship shows that the higher the domestic ratification constraints on the executive, the more a nation will receive in bargaining advantage over a nation that has no similar constraint.<sup>146</sup> If both sides have high constraints, then neither obtains a bargaining advantage.

Schelling's theory illustrates one way that treaties may prove superior to congressional-executive agreements in communicating credibility—credibility of a different sort than discussed earlier. The two-thirds majority of the Senate is one of the Constitution's highest procedural hurdles for federal action. It sends a costly signal to another nation that the United States can only accept a certain range of international agreements. Its use gives the United States an advantage in negotiating with a country that has no domestic constitutional ratification requirements, or at least negates any advantage that a similar democracy might have enjoyed. Of course, congressional-executive agreements would provide some of the same benefits, but treaties allow the United States to ratchet the constraints even higher. Following an approach that uses only congressional-executive agreements would force the nation to give up the potential bargaining advantages from having a choice of instruments.

#### CONCLUSION

This Article explains the functional trade-offs between various forms of international agreements under the Constitution. It shows that, putting aside the arguments rooted in constitutional legitimacy, a choice of instruments can provide advantages to American foreign policymaking. It adopts a model that understands the primary obsta-

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<sup>144</sup> See *id.* at 27–28.

<sup>145</sup> See, e.g., HELEN V. MILNER, INTERESTS, INSTITUTIONS, AND INFORMATION: DOMESTIC POLITICS AND INTERNATIONAL RELATIONS 68 (1997); Ahmer Tarar, *International Bargaining with Two-Sided Domestic Constraints*, 45 J. CONFLICT RESOL. 320, 323–25 (2001).

<sup>146</sup> See Tarar, *supra* note 145, at 329–30.

cles to rational agreements between two states as asymmetric information and signaling commitment. The choice between treaties and congressional-executive agreements allows the United States to reveal different levels of private information and signal varying levels of commitment in the course of reaching a bargain.

The President and Congress could achieve the same ends by specifying a different level of approval in a congressional-executive agreement itself. If, for example, the political branches wanted to reveal more private information, on a par with a treaty, they could specify that a congressional-executive agreement must receive 60%, 67%, or even 75% approval in both houses. Congress has not yet attempted something like this. Such a mechanism raises questions about whether a current Congress can bind a future Congress. If a Congress were to enact a congressional-executive agreement by a simple majority and delete the higher vote requirement, it would have met the requirements to become federal law. The United States' bargaining partner might question the reliability of ad hoc vote requirements in congressional-executive agreements that do not originate from the Constitution itself. Adhering to the Constitution's vote requirements for statutes and treaties may provide stronger indications about the reliability of the signals sent by the United States.

These ideas reinforce the value of understanding in instrumental terms the process of making international agreements. The contest over whether treaties or statutes are the only valid form of reaching international agreements has had little to no impact upon the political or judicial branches of the government. The United States continues to use both methods to make its international commitments. This Article proceeds from the assumption that a useful, but little exploited, approach is to judge the consequences of the different approaches. More attention to the costs and benefits of treaties and congressional-executive agreements allows us to not only better understand their use. It also helps identify the advantages to American foreign policy of the choice of instruments.